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No. 09-1476

In the Supreme Court of the United States

BOROUGH OF DURYEA, PENNSYLVANIA, *et al.*,
Petitioners,

v.

CHARLES J. GUARNIERI,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent does not dispute (1) that a clear circuit conflict exists, (2) that the ten other federal courts of appeals and four state supreme courts to have ruled on the issue have all held in line with *Connick* v. *Myers*, 461 U.S. 138 (1983), that public employees may not sue their employers for retaliation under the Petition Clause when their petitions involve matters of purely private concern, (3) that the Third Circuit has repeatedly rejected requests to revisit its outlier position, and (4) that only this Court's intervention can establish uniformity on this important point of law. Nor does respondent deny that the Third Circuit rule exempts ordinary workplace grievances from *Connick*'s public concern requirement.

Instead, respondent makes three quite odd arguments. First, he urges that the Third Circuit's rule is "limited," *e.g.*, Br. in Opp. 9, or "narrow," *e.g.*, *id.* at 9, 10, because, in his view, although it applies to all employee lawsuits, grievances, and other formal complaints, *id.* at 8, 9-10, it does not extend to "emails," "verbal complaints," "internal memoranda," "letters," and "phone calls," *id.* at 11-12. Second and even more surprisingly, he argues that he should not be considered "a public employee at the point of time when he engaged in the assertedly protected activity," *id.* at 23, a period of over two years stretching from early 2003, when he first grieved his dismissal, until July 2005, when he filed his lawsuit—for all of which he either received pay from the Borough or was adjudged suspended by an

arbitrator. Third, he argues that there is no real tension between *Connick* and *McDonald* v. *Smith*, 472 U.S. 479 (1985), on the one hand, and the Third Circuit's rule, on the other, because the Petition Clause must be understood to "protect[] access to the courts." Br. in Opp. 27. Each contention seriously mistakes the law or the facts—or both.

In *San Filippo* v. *Bongiovanni*, 30 F.3d 424, 439-443 (3d Cir. 1994), the Third Circuit held that *Connick*'s public concern limitation does not apply to "petitions" and indicated what actions so qualify. At one extreme, it held, "neither the United States nor the several states are required to recognize as a 'petition' whatever particular communication is so characterized by one who chooses to protest governmental acts or omissions." *Id.* at 442. At the other, "[l]awsuits, grievances, [and] workers compensation claims" clearly qualified. *Id.* at 439 n.18. To the Third Circuit, these latter activities all share one critical feature: they "invok[e] a formal mechanism for redress of grievances against the government." *Ibid.*[1]

What is critical, then, is not, as respondent contends, a complaint's level of formality and resemblance to a traditional lawsuit, but whether

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[1] Although the *San Filippo* opinion referenced "lawsuits," it never limited petitions to this one form. To the contrary, it expressly noted that it was using "the term 'lawsuit'" as shorthand for the broad range of conduct protected without reference to *Connick*'s "public concern" requirement, *i.e.*, "any device invoking a mechanism for redress of grievances against the government." *Ibid.*

the complaint "invoke[s] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18; *id.* at 442. Lawsuits can do that, of course, as can grievances and workers compensation complaints. It is also true that most office emails, letters, oral remarks, and phone calls do not. But sometimes they can, see *Bradshaw* v. *Twp. of Middletown*, 296 F. Supp. 2d 526, 546 (D.N.J. 2003) (holding that "public employee's announcement of an intention to file a lawsuit" constitutes a petition), and there are many ways in addition to filing a lawsuit, grievance, or workers compensation complaint to "invok[e] a mechanism for redress of grievances against the government," *San Filippo*, 30 F.3d at 439 n.18—including requesting mediation, filing an administrative complaint with an outside body, and asking for a hearing before a legislative or executive body. See, *e.g.*, *Morgan* v. *Covington Twp.*, No. 3:07-cv-1972, 2009 U.S. Dist. LEXIS 56003, at *29-32 (M.D. Pa. Mar. 6, 2009); *Ivan* v. *County of Middlesex*, 595 F. Supp. 2d 425, 469-470 (D.N.J. 2009); *Miller* v. *Weinstein*, Civil Action No. 06-224, 2008 U.S. Dist. LEXIS 111949, at *58 (W.D. Pa. Sept. 12, 2008).

Even if the Third Circuit's rule were strictly limited to lawsuits and grievances, as respondent suggests, it would still provide many opportunities for circumventing *Connick*'s public concern requirement: namely, every time a public employee files an employment grievance. Grievances are hardly uncommon or difficult to file. When a mere announcement that one plans to file a grievance constitutes formal petitioning, as it does in the Third

Circuit, cf. *Bradshaw*, 296 F. Supp. 2d at 546, the opportunities for leveraging an everyday workplace gripe into a constitutional case are legion. It is simply not true, as respondent asserts (ignoring, among other things, 42 U.S.C. § 1988), Br. in Opp. 19, that high costs and gatekeepers, such as lawyers and unions, will deter employees from petitioning.

It is true, of course, as respondent devotes more than one-third of his brief in opposition to detailing, Br. in Opp. 8, 17-18, 1a-16a (listing all Third Circuit cases and district court cases from within the Third Circuit applying *Connick*), that *Connick* continues to govern in many First Amendment retaliation claims even within the Third Circuit. This is unsurprising and reflects only the obvious fact that many everyday workplace complaints do not seek to "invok[e] a mechanism for redress of grievances against the government." *San Filippo*, 30 F.3d at 439 n.18.

Respondent is wrong, however, to insist that "*Connick*'s public concern standard continues to govern the *overwhelming majority* of public employee First Amendment cases in the Third Circuit." Br. in Opp. 18 (emphasis added). In fact, it has not done so in nearly half of recent cases. Although respondent's appendix identifies eight district court free speech cases decided in 2010 applying the *Connick* standard, Br. in Opp. App. 1a, six district court petition cases in that same span of time have applied *San Filippo* instead. *Emigh* v. *Miller*, Civil Action No. 08-1726, 2010 U.S. Dist. LEXIS 74414, at *46-50 (W.D. Pa. July 23, 2010),

Pa. State Troopers Ass'n v. *Paulowski*, Civil Action No. 1:CV-09-1748, 2010 U.S. Dist. LEXIS 59544, at *16-17 (M.D. Pa. June 16, 2010); *Baltimore* v. *Harrisburg Parking Auth.*, Civil Action No. 1:07-cv-01244, 2010 U.S. Dist. LEXIS 59508, at *25 (M.D. Pa. June 15, 2010); *Davis-Heep* v. *City of Philadelphia*, Civil Action No. 09-5619, 2010 U.S. Dist. LEXIS 39023, at *12-15 (E.D. Pa. Apr. 19, 2010); *Whitfield* v. *Chartiers Valley Sch. Dist.*, 2:09cv1084, 2010 U.S. Dist. LEXIS 37545, at *79-83 (W.D. Pa. Apr. 15, 2010); *Salisbury* v. *City of Pittsburgh*, Civil Action No. 08-cv-0125, 2010 U.S. Dist. LEXIS 15773, at *30-31 (W.D. Pa. Feb. 23, 2010). In the current calendar year, district courts within the Third Circuit have applied and not applied the *Connick* standard to public employment retaliation cases almost equally.

Nor is it surprising that "*San Filippo* often is not outcome determinative." Br. in Opp. 20. In fact, few legal doctrines, including *Connick*'s public concern requirement itself, usually are. What is surprising is that respondent believes this fact relevant. A doctrine need not be outcome-determinative to matter and any doctrine—no matter how important—fails to be uniformly outcome-determinative when plaintiffs must establish any other element to make their legal claim.

Respondent also contends that even if the issue in this case is cert-worthy it comes in an inappropriate vehicle. In particular, he claims he should not be considered "a public employee speak[ing] . . . as an employee," Br. in Opp. 24, at the time he filed his

initial grievance and because, although he admittedly filed his lawsuit when he was a public employee, the lawsuit implicates none of the "sound principles of federalism and the separation of powers," *id.* at 26 (quoting *Garcetti* v. *Ceballos*, 547 U.S. 410, 423 (2006)), that this Court found relevant in *Garcetti*. The first claim, however, is misleading, while the second tries to obfuscate what it cannot fail to admit.

Respondent was fired on February 7, 2003, filed his grievance on February 20, 2003, participated in arbitration after that, and on December 28, 2004, learned that the arbitration had resulted in his reinstatement, an award of back pay from February 7, 2004, and a disciplinary suspension from February 7, 2003 until February 6, 2004. C.A. App. A00885. At the time respondent filed his grievance, in other words, the arbitrator held him to be an employee—albeit one petitioners had a valid reason to suspend. That decision bound both petitioners and respondent. If petitioners had failed to treat respondent as an employee for that period they would have been in violation of the arbitration decision. In similar cases, moreover, courts have recognized dismissed-but-later-reinstated public employees who sue their employers for retaliating against them for their having sought the arbitration that overturned their dismissal to have been "employees" at the time they sought reinstatement through arbitration. *See Zugarek* v. *S. Tioga Sch. Dist.*, 214 F. Supp. 2d 468, 475-476 (M.D. Pa. 2002); *cf. Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346

(1997) (former employee considered "employee" under Title VII's antiretaliation provision).

Respondent filed his lawsuit in July 2005. He amended it on December 21, 2006 to allege that the Borough had denied him overtime in retaliation for his having filed the suit itself. Am. Compl. ¶¶ 39-42. He cannot – and does not – claim he was in any sense not an "employee" when he filed the lawsuit. Instead, he argues summarily and unconvincingly that the "sound principles of federalism and separation of powers" this Court discussed in *Garcetti* have no application when a public employee seeks "redress in a federal court for a violation of federal rights." Br. in Opp. 26. Even if that were true, which it is not, *Connick* identified many *other* policies that require public employee petitions and speech be treated equally.

In fact, respondent's only real argument that this case is an inappropriate vehicle – that, although he availed himself of a mechanism only an employee could use and sought and obtained an arbitration order that he should be considered an employee suspended for disciplinary reasons on the relevant date, he was not actually an "employee"—can only make the case a better one. If the question of when an individual should be considered an "employee" for First Amendment purposes actually interests this Court, this case presents it *in addition to* the issue of whether *Connick*'s public concern requirement applies to petitions. Because respondent filed his lawsuit when he admits he was fully a public employee, there is no danger of this Court not

reaching the *Connick* issue with respect to this claim.

From his reformulation of the Question Presented, Br. in Opp. i ("Does the right of access of the courts"), to his insistence that the Third Circuit's rule is "narrow," Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts"), to his argument that the Third Circuit's rule does not conflict with *McDonald* and *Connick*, Br. in Opp. 27-28 ("Nothing in *McDonald* suggested that the right of access to the courts * * * is limited to lawsuits regarding matters of public concern."), respondent strives heroically to recharacterize the case as involving more the "right of access to the courts" than the Petition Clause itself. This recharacterization represents the central theme of his argument but it is ultimately unsuccessful on its own terms. It mistakes applicable law, misunderstands the Petition Clause, and, most surprisingly, would, even if it were correct, fail to justify applying the Third Circuit rule to much of respondent's own case.

Respondent develops his novel interpretation of the Petition Clause as centrally protecting access to the courts from a misreading of *San Filippo*. He argues that two cases discussed in *San Filippo*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), demonstrate that the right of access to the courts underlies, justifies, and determines the scope of *San Filippo*'s rule. See Br. in Opp. 9-10; see also *id.* at

28. *San Filippo* cannot, however, bear the weight respondent would place on it. Although the opinion did discuss these two cases, it did so not to conclude that the Petition Clause protects at its very core the right of access to the courts but only to acknowledge this Court's holdings that so-called "sham" petitioning receives no Petition Clause protection. See *San Filippo*, 30 F.3d 424, 436 (1994) ("In *California Motor Transport Co. v. Trucking Unlimited*, the Court developed the 'mere sham' exception to petition clause protection.") (citation omitted); *ibid.* ("The unprotected status of 'sham litigation' was again recognized in *Bill Johnson's Restaurants Inc. v. NLRB*, in which the Court announced that baseless litigation is not immunized by the First Amendment right to petition.") (citation omitted). The *San Filippo* court thus excluded sham petitions from its otherwise capacious Petition Clause protection. See *id.* at 443 ("On remand, the district court should consider which, if any, of San Filippo's grievances and lawsuits constituted a 'petition,' and whether any such 'petition' was non-sham. The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.") Litigation in court does receive some protection under the Petition Clause but, as the *San Filippo* court acknowledged (quoting this Court's decision in *California Motor Transport*), "[t]he right of access to the courts is * * * *but one* aspect of the right of petition." *Id.* at 436 (quoting 404 U.S. at 510) (emphasis added).

But rights of court access do not, as respondent posits, define the core of the Petition Clause or

warrant special rules for lawsuits. Access to the legislature, not to the courts, was the central object of the Petition Clause's protection. Thus, James Madison explained when he introduced what became the First Amendment that "[it is] proper to be recommended by Congress to the State Legislatures [that t]he people shall not be restrained * * * from applying *to the Legislature* by petitions, or remonstrances, for redress of their grievances." 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1026 (1971) (emphasis added); see generally Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 156 (1986) ("The express function of the * * * petition clause was to protect citizens applying to the Legislature.") (internal quotation marks omitted).

Respondent appears to recognize that even his ahistorical vision of the Petition Clause cannot quite do the work he needs of it. He thus repeatedly supersizes his access-to-the-courts version of the Petition Clause to cover everyday workplace grievances and arbitrations, which, of course, occur entirely outside the courts. See, e.g., Br. in Opp. 9-10 ("Because the Third Circuit rule derives from the right of access to the courts, it is expressly limited to invocation of some 'formal mechanism for redress of grievances,' such as a lawsuit or a formal grievance and arbitration process under a collective bargaining agreement.") (citation omitted). Why he does so is clear. Without putting grievances and arbitrations at the heart of the clause, he cannot justify even his "narrow" version of *San Filippo* or the Third

Circuit's application of its rule to his own case, which concerns not just a lawsuit but grievances. But putting them there undermines his overarching claim that *Connick* should not apply to petitions because the Petition Clause offers special protection to lawsuits. Respondent cannot have it both ways. This case concerns the Petition Clause, not a more particularized right of access to the courts.

Respondent, thus, cannot complain that the Borough misunderstands *McDonald* and *Connick* because "the petition never discusses, or even mentions, either the reasoning in *San Filippo* that the Petition Clause protects access to the courts, or the decisions of this Court—relied on in *San Filippo*—regarding that right of access." Br. in Opp. 27. That right is largely irrelevant here. If *Connick*'s public concern requirement does not apply to respondent's grievances, it cannot be because the right of access to the courts protects them. Grievances are decided elsewhere. Even respondent's version of the Petition Clause, then, cannot stretch as far as he needs.

It would behoove respondent to offer some reason why the important policies embodied in *Connick* should not apply to petitions. Yet he does not. All he does in the page and a half that comprises the relevant section of his brief, Br. in Opp. 29-31, is first point out the obvious—that *Connick* involved the Free Speech rather than the Petition Clause, Br. in Opp. 30—and then seriously mischaracterize the Borough's argument. We do not argue that states and localities should be able to "forb[id] all [their]

employees to sue [them] * * * and * * * dismiss any worker who d[oes] so," Br. in Opp. 30-31, any more than the employer in *Connick* argued that states and localities could forbid all their employees from saying bad things about them and dismiss any who did so. Rather, we argue simply that the public employment policies that this Court has found exceedingly important in related free speech cases should have equal purchase in petition cases. The particular type of action an employee takes to complain—speech or petition—makes no difference as to any of the policies the *Connick* rule exists to vindicate.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument or, in the alternative, the petition for a writ of certiorari should be granted, the decision below vacated, and the case remanded for proceedings consistent with a per curiam opinion holding that state and local employees cannot sue their employers for retaliation under the Petition Clause unless their petitions involved matters of public concern.

Respectfully submitted.

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